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## **OAL's Recommended Approach to Reviewing "Underground Regulations" Pursuant to Executive Order S-2-03**

**Introduction:** Executive Order S-2-03 requires state agencies to evaluate whether they are using "underground regulations"<sup>1</sup> and if they find that they are to stop using them or adopt them pursuant to the California Administrative Procedure Act (APA)<sup>2</sup>. The Order applies to "agencies," a term that includes "[e]ach Agency, department, board, commission and office of the executive branch."

State government agencies are prohibited from using or enforcing any "underground regulations". This prohibition is contained in statute<sup>3</sup>. Executive Order S-2-03 does not create any new legal duties for agencies. Rather, it calls for agencies to review their operations to ensure that they are complying with existing statutory law.

Each state agency is responsible for complying with the Executive Order. In order to assist agencies in complying with this order, the Office of Administrative Law (OAL) recommends the following process for reviewing guidelines and references.

**Step #1: Identify Rules Requiring Evaluation:** The Executive Order requires you to evaluate whether you are enforcing any "underground regulations." The term "underground regulation" is a colloquial phrase generally meaning a rule or practice that should be, but has not been, adopted pursuant to the APA. The first step in complying with the Executive Order is to identify and list potential underground regulations.

California has the most comprehensive administrative procedure act in the United States. Under the APA, "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

Not every rule is required to be adopted pursuant to the APA. The APA contains several explicit exemptions. However, because the APA definition of "regulation" is so broad any rule of general application should be presumed to require adoption under the APA unless it

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1 Specifically, the relevant portion of the Executive Order S-2-03 provides as follows: "Each Agency shall assess and identify any present issuance, utilization, enforcement or attempt at enforcement of any guideline, criterion, bulletin, manual, instruction, order, or standard of general application which has not been adopted as a regulation in potential violation of California Government Code section 11340.5(a) and submit its findings to OAL pursuant to California Government Code section 11340.5(b) and the Legal Affairs Secretary."

2 California Government Code sections 11340 *et seq.*

3 Government Code 11340.5(a)

is exempt. You cannot evaluate whether or not an exemption applies until after you identify the rule as a candidate for evaluation. As a general rule of thumb, use the following guideline: if a written document embodies a standard or rule that your agency applies generally and that you want to have the force of law, it should be evaluated to determine if it requires adoption as a regulation under the APA.

**Step #2: Evaluate Exemptions:** There are several express exemptions in the APA<sup>4</sup>. Other exemptions from the requirement that rules be adopted pursuant to the APA are found various other places in the California Codes. In general these other exemptions apply only to specific statutory enactments. If a law being implemented contains such an exemption, the people administering the law almost certainly know that. It would probably not be fruitful to waste a great deal of time sifting the Code for undiscovered exemptions.

Some of these exemptions are not as broad as they may appear. For example, the exemption for internal management does not go so far as managing what rules your agency requires members of the public to follow. A rule governing how you document the purchase of forms may be subject to the internal management exemption, but a rule determining when a member of the public is required to complete that form probably is not subject to the internal management exemption.

Likewise the exemption for forms is limited. An agency cannot impose a rule and claim an exemption from APA requirements simply because the rule is contained in a form. For example, if a statute requires an agency to inspect a type of facility, the requirements of that inspection would require adoption under the APA even if the only thing adopted was the form listing what was to be inspected. The California Code of Regulations contains many forms which have gone through the APA rulemaking process.

The agency alone is responsible for deciding whether an exemption applies to a particular rule. If you conclude that a rule does not require adoption under the APA, that determination will be accepted by the OAL for purposes of the Executive Order.

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<sup>4</sup> The most explicit listing of exemptions is Government Code 11340.9, which provides as follows:

11340.9. [The APA] does not apply to any of the following:

- (a) An agency in the judicial or legislative branch of the state government.
- (b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.
- (c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.
- (d) A regulation that relates only to the internal management of the state agency.
- (e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:
  - (1) Enable a law violator to avoid detection.
  - (2) Facilitate disregard of requirements imposed by law.
  - (3) Give clearly improper advantage to a person who is in an adverse position to the state.
- (f) A regulation that embodies the only legally tenable interpretation of a provision of law.
- (g) A regulation that establishes or fixes rates, prices, or tariffs.
- (h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.
- (i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

**Step #3: Decide What To Do About the Possible Underground Regulations.** At this point the agency will have listed potential underground regulations and then removed from the list any that are exempt from the APA rulemaking requirement. The remaining list will comprise rules that the agency employs which should have been, but have not been, adopted pursuant to the APA. There are three possible approaches that the agency can take at this point for purposes of complying with Executive Order S-2-03.

- 1) Begin rulemaking under the APA. The most obvious way to continue the use of an “underground regulation” and to ensure that it actually has the force of law is to adopt it properly pursuant to the APA.
- 2) Stop using the rule. If the agency stops using the suspected “underground regulation” then no further action on that rule is required by the Executive Order.
- 3) Seek a determination from the OAL. The Executive Order requires the OAL to issue an opinion whenever an agency reports that it is employing an “underground regulation.” *This approach is only applicable when the agency is unable to make an evaluation on its own.* There is no logic or purpose to asking for the OAL to evaluate an underground regulation when the agency has either begun adopting it under the APA or decided to stop using the rule.

**Step #4 (if applicable): Collect Documents Necessary for a Determination from the OAL.** Your final step will be to prepare a report of your findings to the Legal Affairs Secretary and the OAL. If this report will include a request that the OAL determine whether or not your procedures constitute regulations that must be adopted under the APA, you must include documents that will allow the OAL to make the determination. If you are seeking a determination, the practice under review by the OAL is to be treated as lacking the force of law until the OAL has completed its evaluation<sup>5</sup>.

The Executive Order requires the OAL to issue a determination to the Governor pursuant to Government Code section 11340.5(c). This section of the APA authorizes the OAL to determine whether a particular practice by a government agency is a regulation which must be adopted pursuant to the APA in order to be effective. With respect to Executive Order S-2-03, the section is inapplicable except in cases in which the agency is unable to make this judgment on its own.

In order for the OAL to complete its determination pursuant to the Executive Order, the agency must provide adequate information so that the OAL may know the actual effect of the rule or practice in question. Some agencies have responded to the Executive Order, for example, by identifying only the name of a memorandum or manual that they believe may constitute an underground regulation. This does not provide the OAL with adequate information upon which to base a determination. If you are seeking a determination from

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<sup>5</sup> Executive Order S-2-03 provides specifically that: “Upon submitting the findings . . . to OAL and the Legal Affairs Secretary, any Agency utilizing such guideline, criterion, bulletin, manual, instruction, order or standard of general application in the normal course of business until OAL makes its determination to the Governor pursuant to California Government Code section 11340.5(c) shall do so on an opinion-only basis which will not carry the force of law.”

the OAL, be sure to provide adequate information so that the OAL staff can evaluate the actual impact of the practice. This must certainly include whatever document contains the actual rule that you want to enforce. You should also provide related documents, such as explanatory pamphlets, that may illuminate how the rule is applied.

Seeking a determination triggers a provision in the Executive Order requiring the agency to treat the practice in question as having no force of law. It is, therefore, in the agency's best interest to ensure that adequate information is provided when seeking an OAL determination. Doing anything less will just delay the process and extend the time during which the practice must be treated as lacking the force of law.

#### **Step #5, Prepare Your Report to the Governor's Legal Affairs Secretary and the OAL.**

After completing the first three steps, you will have identified each potential "underground regulation". It is entirely possible that you will have no potential underground regulations remaining on your list<sup>6</sup>. If you do have potential "underground regulations" remaining on your list, each will be designated either as being proposed for adoption pursuant to the APA, as being withdrawn from use, or as being submitted to the OAL for determination.

Executive Order S-2-03 requires each agency to "submit its findings to OAL pursuant to California Government Code section 11340.5(b) and the Legal Affairs Secretary." The order does not require any particular degree of specificity. Each agency is responsible for conducting this review and is responsible for the correctness of its own evaluation. The OAL is not authorized to and is not going to review or re-evaluate the conclusions reached by the agency.

The agency should prepare a report to the OAL and the Legal Affairs Secretary. The findings reported do not need to detail specific rules evaluated unless they are being submitted to the OAL for its determination. The purpose of the Executive Order is to compel agency compliance with the APA, not to detail the individual items considered by the agencies in performing this evaluation. Some state agencies have complied with the Order simply by reporting that they have completed the assessment called for by the order and they confirm that they are not employing any "underground regulations."

#### **Conclusion.**

Executive Order S-2-03 does not create new obligations on state agencies. The requirement to comply with the APA exists for all agencies independently of the Order. By following these guidelines, you should be able to ensure that your rules comply with the APA, and thus have the force of law, with the minimum effort needed to comply with the Executive Order.

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<sup>6</sup> Several state agencies have completed review pursuant to Executive Order S-2-03 and reported simply that they were not employing "underground regulations."